

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	CRIMINAL ACTION NUMBERS
)	
v.)	IN-07-02-0558 thru IN-07-02-0574
)	
LEONARDO D. GOMEZ)	ID No. 0607012785
)	
and)	
)	
STATE OF DELAWARE)	CRIMINAL ACTION NUMBERS
)	
v.)	IN-07-02-0621 thru IN-07-02-0637
)	
FRANCISCO J. TELLEZ)	ID No. 0607014281
)	
and)	
)	
STATE OF DELAWARE)	CRIMINAL ACTION NUMBERS
)	
v.)	IN-06-07-1991 thru IN-06-07-1994
)	
JORGE GOMEZ)	ID No. 0607015781

Submitted: June 11, 2007

Decided: June 28, 2007

MEMORANDUM OPINION

*Upon Motion of the State for Joinder of Defendants - **DENIED***

Appearances:

Mark H. Conner, Esquire, and James J. Kriner, Esquire, of the Department of Justice, Wilmington, Delaware, attorneys for State of Delaware

Christopher D. Tease, Esquire, Wilmington, Delaware, attorney for Leonardo Gomez

Andrew J. Witherell, Esquire, Wilmington, Delaware, attorney for Francisco Tellez

Natalie S. Woloshin, of Woloshin Lynch Natalie & Gagne, Wilmington, Delaware, attorney for Jorge Gomez

HERLIHY, Judge

In December 2006, defendants Leonardo Gomez & Francisco Tellez were indicted for first degree murder (victim not named),¹ two counts of attempted first degree murder (neither victim named), conspiracy first degree, riot and other offenses. Trial for these two defendants is scheduled to start on November 27, 2007.

In February 2007, Tellez and Leonardo Gomez were re-indicted on all of the original charges. The re-indictment, however, added three new defendants including Jorge Gomez, Leonardo Gomez's brother. None of the three were charged with murder or attempted murder. The charge linking Jorge Gomez to Tellez and Leonardo Gomez is the count charging riot. Among the three added defendants in the re-indictment was Jorge Gomez, Leonardo's brother. Since the re-indictment, two of the indicted defendants have pled leaving only Jorge Gomez.

As the three remaining defendants appear together in the indictment, the State seeks to have them tried together. Even though they are co-defendants in the riot charge and named in the same indictment, the Court views joinder for trial as inappropriate.

Factual Background

The offenses alleged in this case, primarily, of course, the murder and attempted murder charges, are claimed to have occurred on July 16, 2006. The recitation of "facts" herein is based on representations made by counsel. On that July date, there was supposedly a large melee in a small New Castle County Park near the neighborhood known

¹ This is a non-capital case.

as Alban Park. The melee in some fashion moved to a location on Homestead Road in Alban Park.

It is at that location where the shootings occurred. Those shootings lead to the murder and attempted murder charges against Leonardo Gomez and Tellez. The melee, or melees possibly involving a gang fight, prompted riot charges against twelve persons including Tellez and the Gomez brothers. Nine of the twelve persons originally charged have pled guilty leaving these three defendants.

At the current time the trial involving Jorge Gomez is scheduled to start on August 7, 2007.

The State represented at oral argument at the June 11th hearing on its joinder motion that each of these three defendants made statements to the police and that it intended to introduce them at a joint trial. Counsel for the defendants represented there would be no motions filed to suppress the statements. The State also said it would redact portions in each which might implicate either or both of the other defendants.

When the State said that, the Court *sua sponte* raised the issue of whether *Bruton*² issues might, therefore, arise. Separate scheduling was worked out to address any such issues.

The Court will assume, therefore, that the State will proceed to introduce “surgically adjusted” statements from each of the three defendants if there is a joint trial.

² *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968).

Discussion

Analysis of the State's joinder motion starts with the applicable rule:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.³

Defendants who are indicted together, as a general rule, should be tried together.⁴

If a defendant is prejudiced by joinder, however, severance may be warranted.⁵ Whether to grant a motion to join is a matter of discretion.⁶ When it comes to joinder, a defendant must show prejudice.⁷ A defendant may demonstrate prejudice by showing: (1) absence of other substantial, competent evidence of his guilt, (2) antagonistic defenses between himself and the other defendants, and (3) the difficulty of segregating the evidence as between the co-defendants.⁸

There is no indication from Jorge Gomez that he has a defense to the charge of riot that is antagonistic to his brother and/or Tellez which should or would prompt denying the

³ Superior Court Criminal Rule 8(b).

⁴ *Jenkins v. State*, 230 A.2d 262, 272 (Del. 1967).

⁵ Superior Court Criminal Rule 14; *Bates v. State*, 386 A.2d 1139 (Del. 1978).

⁶ *West v. State*, 542 A.2d 1193, 1195 (Del. 1988).

⁷ *Lampkins v. State*, 465 A.2d 785, 794 (Del. 1983).

⁸ *Skinner v. State*, 575 A.2d 1108, 1119 (Del. 1990).

joinder motion.⁹ But that may be too simplistic. Jorge Gomez is charged with riot and several other offenses. He is not charged with murder or attempted murder. He argues that since the shootings occurred at the second location, he was “merely present.” This argument suggests the riot charge against him, and the other two defendants, arises out of events at the County Park.

The State does not dispute Jorge Gomez’s assertion that he was “merely present” at the scene of the shootings. Certainly the offenses charged against him also indicate there is no alleged culpability in the shootings. But as presented to the Court, he was an alleged participant in the “riot” at the County Park. The two incidents, it is represented, occurred two blocks from each other. Twelve people got into several cars and drove from the park to the area on Homestead Road where the shootings occurred.

In one sense the geographical and temporal proximity of the events argues in favor of granting joinder. It has been indicated the whole incident has gang fight overtones, yet Jorge Gomez’s alleged culpability is tied to only one part and not its continuation. There has been no representation that the riot charge involves a renewal of events occurring at Homestead Road or anything beyond what happened at the park.

The real problem with joinder of Jorge Gomez with the charges against Leonardo Gomez and Tellez arises out of the admixture of disparate charges and the State’s intended

⁹ See *Bradley v. State*, 559 A.2d 1234, 1239 (Del. 1989).

use of extra-judicial statements of all three. These two factors are interrelated. The jury would be instructed, and would be whether there are two or three defendants at trial, that there are separate charges, separate defendants and a need to reach separate verdicts.¹⁰ The Court believes there is, nonetheless, a substantial risk of prejudice to Jorge Gomez by joinder.

That prejudice arises from (1) all three defendants being charged with riot, (2) but only two are charged with murder and attempted murder, (3) Jorge Gomez is not one of those two, (4) the separation of events forming to the riot charge from those leading to the shooting charges, and (5) the State's use against all three of even "surgically" redacted out-of-court statements. With each such statement, a cautionary instruction is mandated, but the Court is insufficiently confident such an instruction will adequately address the cumulative prejudice. While admission of such statements is often not alone enough to prevent joinder¹¹ there are occasions, however, where admission of redacted co-defendant statements can create the level of prejudice to make joinder inappropriate.¹² This is such a case.

¹⁰ See *Skinner v. State*, 575 A.2d at 1120.

¹¹ See *Lampkins v. State*, 465 A.2d at 794.

¹² *Jenkins v. State*, 230 A.2d at 273.

Conclusion

For all these reasons, the State's motion to join for trial the charges against Jorge Gomez with those against Leonardo Gomez and Francisco Tellez is **DENIED**.

IT IS SO ORDERED.

J.